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No. 617

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

Appellants appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 17, 1957, setting aside orders of the Interstate Commerce Commission, which approved the issuance of certain securities by the Alleghany Corporation, and enjoining acts of the defendants in furtherance thereof, and submit this Statement (1) to show that this Court has jurisdiction of the appeal and (2) to seek summary reversal of the judgment below on the grounds that it is clearly erroneous and contrary to the decision of this Court upon the earlier appeal herein (353 U. S. 151).

Opinion Below and Prior Opinions

The opinion below (Appendix A, *infra*, pp. 21-40) is not yet reported. The opinion of this Court, reversing and remanding the lower court's earlier judgment which set aside the orders of the Interstate Commerce Commission, is reported at 353 U. S. 151. The reports and orders of the Commission and the opinions below preceding the first appeal to this Court (134 F. Supp. 132, preliminary injunction; 138 F. Supp. 123, final injunction) were reproduced in the papers on that appeal, Nos. 36, 82, and 114, last Term, to which the Court is respectfully referred.

Jurisdiction

This suit was brought under 28 U. S. C. §§ 1336, 1398, 2284, and 2321-2325 to set aside orders of the Interstate Commerce Commission. The judgment of the District Court (Appendix A, *infra*, pp. 41-43) was entered on October 17, 1957, and notice of appeal was filed in that court by the appellants herein on October 29, 1957. The jurisdiction of this Court to review on direct appeal the decision of the District Court is conferred by 28 U. S. C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction of this Court on such direct appeal include *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151; *United States* v. *Marshall Transport Co.*, 322 U. S. 31; *United States* v. *Lowden*, 308 U. S. 225; *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U. S. 781; *Chicago Injunction Case*, 264 U. S. 258.

Question Presented

Whether the District Court violated the mandate of this Court and the Interstate Commerce Act in holding that the stock authorization orders of the Interstate Commerce Commission under Section 20a of that Act, though valid in all other respects, should be annulled on the theory that the

Commission was required to approve Alleghany's control of the New York Central Railroad System before it authorized the preferred stock issue.[1]

The Interest of These Appellants and Their Application for Summary Reversal

The appellants herein are preferred shareholders of the Alleghany Corporation who, with thousands of others similarly situated, exchanged their shares for the new ones approved by the Interstate Commerce Commission and have had their investment substantially frozen by this litigation since June of 1955. The continuing injury they suffer has been recognized in the court below and was a decisive factor in Mr. Justice Harlan's granting of a partial stay over two years ago (see pp. 6, 18-19, *infra*).

We believe that the court below, following reversal of its prior judgment by this Court, has rendered a decision which can be demonstrated with certainty to be in complete variance with the opinion and judgment of this Court on the prior appeal. We propose to show that the decision below rests upon a determination explicitly considered and foreclosed by this Court—a determination neither contem-

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[1] Comprised under this question are the following subsidiary questions presenting additional or related grounds on which reversal of the judgment below is believed to be warranted:

(1) Whether the District Court was precluded under Section 20a of the Interstate Commerce Act from enjoining the stock issue for the reasons stated in its opinion.

(2) Whether Section 5 of the Interstate Commerce Act required approval by the Interstate Commerce Commission of Alleghany's control over the New York Central Railroad System.

These specific questions will be argued if the Court determines that the case requires briefs and argument. In this Statement, however, without detailing these further assertions of error by the court below, we focus on points believed sufficient in themselves to justify reversal without further briefs or argument.

plated nor permitted by this Court's remand solely "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

Considering the several arguments "not previously discussed" with which appellees attacked the propriety of the stock issue, the District Court concluded that the merits of the stock issue as such were for the Commission's judgment and that there were no grounds for interfering with that judgment. However, on the ground that the Commission had failed to approve Alleghany's control over the New York Central, a point previously discussed both below and here, and which this Court had declared it unnecessary to decide, the District Court once again enjoined the long-suspended stock issue.

In the unusual circumstances of this second appeal, we believe a request for summary reversal to be appropriate.

Statutes Involved

Sections 5(2), (3), (4), (7), (8), (9), (11) and 20a of the Interstate Commerce Act (49 U. S. C. §§ 5(2), (3), (4), (7), (9), (11) and 20a) are set forth in Appendix B, *infra*, pp. 44-52.

Statement

The pertinent facts, already considered by this Court less than a year ago, may be summarized as follows:

I. *Proceedings before the ICC.*

On September 17, 1954, the Alleghany Corporation, the New York Central Railroad Company, the Cleveland Cincinnati, Chicago and St, Louis Railroad Company (Big Four), and the Louisville and Jeffersonville Bridge & Railroad Company (Jeffersonville) jointly applied to the Commission under Section 5(2) of the Interstate Commerce

Act for approval and authorization of certain merger and lease transactions and for continuation of Alleghany's status as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and 20a(2) to (11), inclusive of the Interstate Commerce Act. The application stated, *inter alia*, that Alleghany had recently acquired control of the Central as the result of a proxy contest and that Central controlled Big Four.

On March 2, 1955, the Commission's Division 4 issued its report holding that (1) Alleghany controlled Central, as the application had shown, (2) the merger and lease of the Jeffersonville properties required Commission approval under Section 5(2) of the Act and warranted such approval as being consistent with the public interest, and (3) Alleghany was a non-carrier which should "be considered as a carrier subject to * * * section 20a(2) to (11), inclusive, of the Interstate Commerce Act * * *." 290 I. C. C. at 725.

On May 24, 1955, the full Commission affirmed these rulings of Division 4. It held, moreover, that Alleghany's acquisition of control over Central, an integrated carrier system, had not required its approval under Section 5(2) of the Act.

In the meantime, on February 18, 1955, Alleghany applied to the Commission for an authorization under Section 20a of the Interstate Commerce Act to issue a new 6% convertible preferred stock, pursuant to a charter amendment approved by all classes of its stockholders, in exchange for its outstanding shares of 5½% Series A preferred. On May 26, 1955, Division 4 issued its report approving the new issue, with one change in the exchange plan. In an order of June 22, 1955, the full Commission denied reconsideration.

II. *Prior proceedings and earlier judgment (since reversed) in the District Court.*

On June 6, 1955, appellees filed their complaint in the court below attacking the Commission's "status orders" of March 2 and May 24, 1955. In a supplemental complaint on

July 7, 1955, they sought nullification of the preferred stock orders of May 26 and June 22, 1955.

On June 23, 1955, District Judge Dimock issued a temporary restraining order against the issuance, transfer or distribution of Alleghany's new 6% preferred stock.

On July 26, 1955, the three-judge District Court granted a preliminary injunction (with Circuit Judge Hincks dissenting) against both the status orders and the stock orders of the Commission. 134 F. Supp. 132. Stating that he was "most impressed with the prejudice which continuance of the injunction will work on the preferred stockholders" (75 S. Ct. 912, 916), Mr. Justice Harlan, on August 3, 1955, stayed this injunction as to the portion of the new preferred delivered prior to Judge Dimock's restraining order. As this Court has noted, however (353 U. S. at 159, n. 4), the New York Stock Exchange continued (and still continues) to suspend trading in this stock pending this litigation.

On November 18, 1955, the three-judge court (with the late Judge Frank sitting in place of Judge Hincks) concluded that the temporary injunction should be made permanent, staying enforcement in accordance with the partial stay granted by Mr. Justice Harlan, 138 F. Supp. 123.

In its opinion granting the preliminary injunction, the District Court held, so far as is now material, that:

> "(1) The Alleghany application of September 17, 1954, seeking approval of the merger and lease transactions, did not present the kind of acquisition of control requiring or warranting the Commission's status orders under Section 5(2) of the Act. 134 F. Supp. at 142-3.
>
> (2) The Commission had erred in concluding that Alleghany's acquisition of control over Central did not require approval under Section 5(2). *Id.* at 143-5.

Characterizing the Commission's views on these points as a "double misinterpretation" (*id.* at 144), the District Court concluded (*id.* at 145):

> "Under our interpretation of the statute the I. C. C. could not have made a finding of control without approving control; yet it failed to make the prerequisite

finding that the control was 'consistent with the public interest' required by subdivision (b) of section 5(2). The case must go back for consideration of that question if Alleghany persists in its claim that it has acquired control of New York Central and in its desire for a declaration of its right to be 'considered as a carrier.' "

In its opinion granting a permanent injunction (138 F. Supp. 123), the District Court adhered "for the most part" (p. 127) to its earlier rulings, but reached a more drastic conclusion as to the consequences of the Commission's failure to consider and approve Alleghany's acquisition of control over Central. This omission, the court now held, left the Commission without "jurisdiction under Section 5(3)" (*id.* at 128), with the result that a final judgment was required setting aside both the status and the stock orders. Alternatively, however, the court said in Appendix II to its opinion (*id.* at 136):

> "If we are wrong, however, in this holding that the I. C. C. is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) whether such control is in the public interest."

III. *The Decision of this Court.*

Listing the three questions to be considered in determining whether the Jeffersonville transaction justified the Commission's assertion of jurisdiction under Section 5(2) of the Act, this Court stated the first as being (353 U. S. at 161):

> "Was Commission approval of Alleghany's acquisition of control over Central required?"

This Court then described the pertinent ruling of the District Court as follows (*ibid.*):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.' "

In its reversal of the District Court, this Court went on to discuss, but found it unnecessary to decide, the question whether Alleghany's control over Central required Commission approval. For, the Court said (*id.* at 161-2),

> "even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved.' Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

While Mr. Justice Douglas (joined by the Chief Justice and Mr. Justice Black) dissented on other grounds (353 U. S. at 175-9), there was no disagreement on the foregoing conclusion, which has now become the decisive point in the case.

In addition to this point, this Court also held in the first appeal that (1) the Commission was correct in finding that Alleghany controlled Central,[2] (2) the Jeffersonville proceeding presented an "acquisition of control" requiring Commission approval under Section 5(2) of the Act,[3] (3) appellees were not entitled to an evidentiary hearing in the merger-status order proceeding, and (4) appellees' claim of a right to a hearing in the preferred stock proceeding was "governed by § 20a(6) of the Act, which provides that 'The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority'" (353 U. S. at 175).

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[2] The dissenting opinion was in agreement on this point, 353 U. S. at 176.

[3] This, as we read the opinions, was the point on which the Court divided.

Accordingly, this Court concluded that (*ibid.*) "the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

IV. *Proceedings in the District Court on remand.*

On the remand, the record before the District Court was, with slight and immaterial additions, the same as that which had been before this Court.[4] Answering appellees' attacks on the merits of the preferred stock exchange plan approved by the ICC, the District Court held that the questions thus presented "were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute [Section 20a]; and that we may not substitute our views for those it expressed." (Appendix A, *infra*, p. 24.) The Court also rejected claims that the Commission had erred in (1) its change in the conversion date of the plan as submitted by Alleghany and (2) the denial of appellees' request for an evidentiary hearing in the preferred stock proceeding. (*Infra*, pp. 24-5.)

The District Court concluded, however (*infra*, p. 25), that the Commission's stock order must be set aside because of

> "the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested."

Noting that under this Court's decision such "need for validation" could not be viewed as a defect in the Commission's jurisdiction, the District Court described its ground

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[4] The only additions, none of any consequence here, were the papers submitted in support of motions to make the judgment of this Court the judgment of the lower court and for disposition of the sole remaining issue remanded by this Court.

of decision now as turning on "the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act." (*Infra*, p. 25.)

Explaining its conclusion, the District Court said (*infra*, p. 30):

> "The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act."

In answer to the argument that its conclusion was inconsistent with this Court's ruling that there was no need to decide whether Alleghany's acquisition of control over Central required Commission approval, the District Court said (*infra*, pp. 30-31) that this Court's holding

> "did no more than establish the jurisdiction of the Commission and the validity of the status order. The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action, relief be granted for the benefit of the wrongdoer notwithstanding his wrong." [Footnotes omitted.]

The Question is Substantial and Summary Reversal is Appropriate

This Court, in reversing the lower court's earlier judgment, remanded only the question whether "the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." 353 U. S. at 175. Con-

sidering appellees' several objections as to the wisdom and the propriety of the stock issue itself, the District Court concluded that these were all matters for the Commission's judgment and that there was no ground for disturbing that judgment.

Nevertheless, though it had been directed by this Court to consider on the remand only a narrow claim "not previously discussed," the District Court then proceeded to reformulate a point which was discussed at length in its earlier opinions as a basis for its first erroneous judgment and which was expressly considered and found unnecessary for decision by this Court. The District Court has acknowledged (*infra*, pp. 25, 34-5, n. 2) that this Court's decision erased the contention that Commission "validation" of Alleghany's control over Central was a "jurisdictional" prerequisite to the stock order. It has held, nevertheless, that such validation remained "an obvious first question in any application by Alleghany" (*infra*, p. 30). The result, we submit, is a plain departure from the mandate of this Court; however the point is phrased, the court below has reinstated as a "first question" an issue which this Court eliminated as an "unnecessary" question.

It seems equally clear, moreover, that the three-judge court has exceeded its competence in reaching out and attempting by indirection to compel the Commission to proceed under Section 5(7) of the Interstate Commerce Act—a provision which merely says the Commission is "authorized, upon complaint or upon its own initiative without complaint," to take action of the kind the lower court has in effect commanded.

Because the error of the District Court seems clear, because the prolongation of this litigation has worked severe and unquestioned hardships upon the present appellants and many others, and because the Commission's orders have been amply reviewed and found proper in all material respects, we respectfully submit that this is a proper occasion for summary reversal of the decision below.

I

The District Court Misconceived and Violated the Terms of this Court's Remand.

The earlier opinions in this case, both here and in the court below (see pp. 6-9, *supra*), and the opinion of the District Court on remand serve, in our view, as ample demonstration that the District Court has misunderstood this Court's mandate. To be sure, the District Court has proposed a distinction between this Court's holding that the control-of-Central question made no difference for purposes of ICC "jurisdiction" and the view that this was a basis for nullifying the agency's action on the "merits." But we think it clear that this is a semantic distinction without a difference, that the District Court's latest action merely rephrases a result barred by this Court, and that any other view renders the earlier appeal largely futile.

That the present decision actually reinstates a holding which was reversed by this Court is made especially clear by the fact that the District Court was careful in its earlier opinion to make this very point *both in jurisdictional and in non-jurisdictional terms.* As we have noted, the District Court said in the opinion announcing the decision reversed by this Court (138 F. Supp. at 136):

> "If we are wrong, however, in this holding that the I. C. C. is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) *whether such control is in the public interest.*" (Emphasis added.)

If that alternative holding—that the Commission was required, *on non-jurisdictional grounds,* to determine whether Alleghany's control of Central was proper—had been correct, this Court could not have reversed and held this very question of approval of control unnecessary to decision. Thus, the very thoroughness and precision of the District Court's earlier opinion serve to demonstrate its repetition of its earlier error on the remand.

The identity of the lower court's latest ruling with the one this Court reversed extends to a close identity in language and reasoning. In the earlier proceedings, the District Court charged that the Commission had sought to "escape any responsibility as to the acquisition of the Central by Alleghany and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge & Railroad Company into the Big Four, all the while *trying to keep regulatory control of Alleghany and thus preclude any consideration of the matter by the S. E. C.*" 134 F. Supp. at 144 (emphasis added).

Now, again, though couching its result in terms of the merits rather than jurisdiction, the District Court concludes that, unless it first approved the acquisition of Central control, the Commission "would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act" (*infra*, p. 30). Earlier in this most recent opinion, the District Court likewise emphasizes the view, repudiated by this Court, that Alleghany "upon the basis of this violation [namely, failure to obtain approval of control over Central] • • • now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest." (*Infra*, p. 29.)

There is no meaningful difference, we submit, between the District Court's original view that "the I. C. C.'s power to authorize the issuance of the preferred stock depended upon the existence of a valid order authorizing Alleghany to acquire control of a carrier or carriers" (138 F. Supp. at 139) and its conclusion on the remand that "approval of acquisition and continued control is an obvious first question in any application by Alleghany" (*infra*, p. 30). Both formulations are equally inconsistent with this Court's holding that there was no need to determine whether Alleghany's control over Central required Commission approval.

True, the District Court's holding is now phrased in terms of the substantive "public interest" standards to be followed by the Commission rather than in terms of the agency's "jurisdiction." But the result is not different in any material respect from the earlier one rejected by this Court. Indeed, the appellees themselves recognized fully on the first appeal that any such conclusion via the "public interest" route had been foreclosed here. In their petition for a rehearing by this Court, they said (p. 3):

> "The effect of the majority opinion [of this Court] is to permit Alleghany to use its unlawful control of Central for self-aggrandizement, and to deprive Alleghany's stockholders of protections enacted for their benefit by the Congress in the Investment Company Act. Neither result can conceivably be 'consistent with the public interest.'"

While we disagree, of course, as this Court did, with the quoted argument, we think it fairly represents a view which this Court rejected. And while the argument there was posed in terms of Section 5(2), its failure entails equally the defeat of the substantially identical "public interest" position revived by the District Court under 20a.

The District Court was led astray, we suggest, in construing this Court's observation that "control," not "approved control," was a sufficient condition of Commission jurisdiction. 353 U. S. at 161-2. In this connection, this Court said (*id.* at 162):

> "To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

Reasoning that the Commission's stock order is "for the private benefit of Alleghany" (*infra*, p. 28), the District Court concluded (*infra*, p. 29) that "a person in illegal control of a carrier * * * might be subject to all the burdens and duties imposed by the Act upon a person in legal con-

trol, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act."

Thus, the District Court read this Court's finding of Commission jurisdiction to mean only a kind of "one-way jurisdiction"—jurisdiction to impose "burdens and duties" but none for "relief or benefit." Building upon this Court's illustration of the situation "were Alleghany contesting" jurisdiction, the lower court overlooked the fact that this Court's decision was in a case where Alleghany was in fact "acquiescing," and in this way rendered the successful appeal of Alleghany and the other defendants a futility. We submit that this was plain error.

Nor is the error cured by the suggestion of the court below (*infra*, p. 31) "that although there might be circumstances when such action [authorization of a stock issue] could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case." While this approach is in line with the view that the decision now is on the "merits" rather than on "jurisdiction" of the Commission, the clash with this Court's decision remains clear.

It is no answer to say that in some undefined, hypothetical case the threshhold block originally interposed by the District Court, removed by this Court, and now reinstalled could be surmounted, and that this sufficiently meets this Court's ruling that the block is not "jurisdictional." For this Court's upholding of the Commission and the other appellants on this issue is almost wholly divested of meaning if the lower court remained free to demand some findings not required by this Court as a condition precedent to approval of the stock issue. The decisive point is that the question held by this Court to be unnecessary to decision in *this case* has been held on remand to be dispositive.

II

The District Court Misinterpreted Section 5(7), (8), and (9) of the Interstate Commerce Act, as Discussed by this Court on the Prior Appeal.

Assuming, as the court below has held, that Alleghany's control over Central required authorization by the Commission and was therefore "unlawful" under Section 5(4) of the Interstate Commerce Act (see Appendix A, *infra*, p. 27; Appendix B, *infra*, p. 46), this Court pointed out on the first appeal (353 U. S. at 162) that "Remedies against a violator are provided by § 5(7), (8), and (9) of the Act." Misinterpreting the significance of the reference to these provisions and overlooking the sharp boundaries of its functions as a three-judge court, the District Court proceeded to "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88.

Thus, the District Court began with the premise (*infra*, p. 27) that Section 5(7) "*mandates* action by the Commission to compel correction of violations of" 5(4) (emphasis added). But Section 5(7), quoted by the court immediately thereafter, "mandates" nothing; instead, it declares that the "Commission is *authorized*, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) * * *." (Emphasis added.)

Building upon its reading of "authorized" as "mandated," the District Court then overlooked entirely the following subdivision of Section 5, which leaves no doubt that Congress provided for initiative by the Commission, not

by the courts (and certainly not by a three-judge court). Section 5(8) provides (Appendix B, *infra*, p. 47):

> "The district courts of the United States shall have jurisdiction *upon the complaint of the Commission*, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process • • • as may be necessary to restrain such person from violation of such provision or to compel obedience to such order." (Emphasis added.)

Here is a familiar type of enforcement scheme designed by Congress to commence only with an administrative decision to act. In such a division of administrative and judicial functions, the administrative judgment against taking action "is final." *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25; *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (D. C. Cir.), *certiorari denied*, 345 U. S. 930. The court below, reaching out to upset that judgment by indirection in a manner nowhere authorized by the Interstate Commerce Act, has in effect undertaken "to exercise an essentially administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21. In this, we submit, the court below violated both the judgment of this Court in this case and the more general duty of "due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141; cf. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767.

The District Court recognized, and proffered an explanation of, its departure from the division of functions

specified by Congress. It said (Appendix A, *infra*, pp. 27-8):

> "Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete. * * * The question is simply one of law."

The fallacy in this analysis, we believe, is that Congress nowhere suggested any such law-fact dichotomy as a basis for transferring the Commission's powers to the courts. The Commission's "exclusive and plenary" authority under Section 5[5]—and the corollary provision for judicial action only at the instance of the Commission—extends to issues of law as well as fact. There is no ground for the view that a court may intervene and control the Commission's authority to "investigate and determine"[6] merely because it believes that the Commission's failure to invite such intervention stems from a mistaken view of the law.

The error is compounded further, we think, because of the limited character of the three-judge court's functions under the Urgent Deficiencies Act. Congress not only limited judicial action under Section 5(4), (7), and (8) of the Interstate Commerce Act to proceedings "upon the complaint of the Commission"; it also provided that this restricted role was to be played by the regular "district courts of the United States," not specially constituted three-judge courts.

This Court has "frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines." *United States* v. *I. C. C.*, 337 U. S. 426, 443, and cases cited. In undertaking to make a

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[5] Section 5(11).

[6] Section 5(7).

determination under Section 5 which Congress has left for the Commission, the District Court exceeded these long-standing restrictions.

III

The Continuing Injury to the Preferred Shareholders Resulting from the District Court's Patent Error Supports the Plea for Summary Reversal.

Over two years ago, in granting a partial stay of the District Court's preliminary injunction, Mr. Justice Harlan observed that he was "most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders." 75 S. Ct. at 916. Similarly, Judge Dimock recognized "the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return" (Transcript of Record, p. 641, Nos. 36, 82 and 114, last Term, opinion denying request for stay). And see the references to these same hardships in the dissents of Judge Hincks. *Id.* at 635-6, 637, 642.

These hardships, aggravated by long duration, persist and mount so long as the present litigation continues. It is undisputed that, apart from the injuries to other parties, the present appellants and thousands of other preferred stockholders similarly situated continue to hold investments which are substantially frozen—suspended from Stock Exchange trading, largely or wholly non-pledgeable, non-productive, defenseless against the vagaries of the market.

We mention these facts in the belief that, if we are correct in the view that the District Court has plainly erred, they help to justify the summary reversal and termination of this litigation for which this Statement prays.

Conclusion

The question presented is at least substantial and warrants the noting of jurisdiction by this Court.

Moreover, with all deference to the distinguished bench below, and mindful of the extraordinary nature of such a request, we believe that the District Court has so clearly misunderstood the decision of this Court and the pertinent statute as to warrant reversal here without further briefs or argument. Accordingly, the judgment below should be reversed with directions to dismiss appellees' complaint.

Respectfully submitted,

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800 Park Avenue,
New York 22, New York,
Attorney for Appellants,
Joseph S. Gruss et al.

JOSEPH M. PROSKAUER,
MARVIN E. FRANKEL,
ALLEN L. FEINSTEIN,
Of Counsel.

November, 1957.

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated, *Plaintiffs,* *against* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, et al., *Defendants.*	CIV. 101-114

BEFORE:

CLARK, Circuit Judge and

DIMOCK and WALSH, District Judges

APPEARANCES:

ROSSTON, HORT & BRUSSEL, ESQS. (GEORGE BRUSSEL, JR., and EUGENE G. KING, Of Counsel) for Breswick & Co. and Myron Neisloss

RANDOLPH PHILLIPS, Pro Se

ROBERT W. GINNANE, ESQ., General Counsel for Interstate Commerce Commission (B. FRANKLIN TAYLOR, JR., Assistant General Counsel, with him on the brief)

NOTE: Footnotes are printed following text of opinion.

SIMPSON, THACHER & BARTLETT, ESQS.,
WHITE & CASE, ESQS.,
WHEELER & WHEELER, ESQS., (WHITNEY NORTH SEYMOUR, DAVID HARTFIELD, JR., EDWARD K. WHEELER, and DAVID W. WALLACE, Of Counsel) for Alleghany Corporation

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS., (HAROLD H. LEVIN, MARVIN E. FRANKEL and ALLEN J. FEINSTEIN, Of Counsel) for Defendants Joseph S. Gruss, et al.

EDWARD M. GARLOCK, ESQ., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

SAMUEL A. MEHLMAN, Pro Se

ALEXANDER KAHAN, ESQ., and,
A. LICHTENSTEIN, ESQ., (ALEXANDER KAHAN, Of Counsel) for Adelaide Neuwirth and common stockholders of Alleghany Corporation, representatively.

WALSH, D.J.

Plaintiffs, common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1] We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this holding and held that the issue was subject to the Interstate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[1a]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock,

according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used. They also claim that the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and also the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substan-

tial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises". 41 Stat. 394, 49 U. S. C. § 20a(3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a(6) of the Interstate Commerce Act, 41 Stat. 439, 49 U. S. C. § 20a(6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its investigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already

ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the non-call period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdic-

tion over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.-Control*, 281 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery*, 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.-Receivership*, 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 723, 732-4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11.[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> "It shall be lawful, with the approval and authorization of the Commission * * * for a person which is not a carrier to acquire control of two or more carriers * * * *". (§ 5[2][a]).

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the un-

challenged prior consistent administrative interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> "The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by another person." (Emphasis added).

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because

the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over ¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation.[11]

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act, is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order which made available to the Commission infor-

mation for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control[12] and usually compelled divestiture[13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith[14] due to an

oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Supreme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end

every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

CHARLES E. CLARK.
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Dated: September 27, 1957.

FOOTNOTES

[1] Briefly the history of this proceeding is as follows:

Mar. 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

Apr. 6, 1955—Plaintiffs, in a related action, *Breswick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commenced by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plaintiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two-thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J. dissenting). 134 F. Supp. 132.

Aug. 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

Nov. 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined.

it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction, as modified by Mr. Justice Harlan, was continued.

Apr. 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for consideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

[1a] The scope of the remand was stated as follows, 353 U. S. at p. 175:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. • • • •"

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161-2). It said:

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'
>
> "The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging

in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J, B. & R. Co., Merger,* 290 I. C. C. 725, 733, 741, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.*, (353 U. S. 151). See pp. 425, 435, 441-2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

[2b] Record, op. cit., pp. 425-7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506-515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143-44; 138 F. Supp. 123, 137-38.

[5] 353 U. S. at p. 161.

[6] In *Louisville & J. B. & R. Co. Merger,* 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. [Citing *Seaboard Air Line Ry. Co: Receivership,* 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization,* 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry Co. Control,* 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.,* 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.,* 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6a] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948).

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, , Record, op. cit., pp. 511-12, 513 (full Commission).

[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 166):

	Cost	*Indicated Market Quotations*
New York Central Securities ..	$ 6,918,118	$ 9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	$14,418,118	$19,657,800
Total investments	$33,342,393	$67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528-530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at p. 741.

While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing". (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931).

> "• • • If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Combinations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20(a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp. 8, 9 (64th Cong., 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

> "Mr. McKenzie: Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

> Mr. Rayburn: It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it." 51 Cong., Rec. 9687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20(a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Investment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

> "The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger-Investigation of Control*, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 M. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control, supra.*, 60 M. C. C. 321, 327, 329 (1954) it was said:

> "The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits • • • ". (327)

• • •

"• • • In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered". (329).

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger, supra.*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control, supra.*, 40 M. C. C. 499 (1946); *Manlowe-Control*, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 636 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarly, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259-60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kolowich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control*; op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"• • • and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest".

The fact that the applicant was in good faith unaware of the illegality, is a significant consideration. *Coast Lines Truck Service*,

Inc.-Control and Merger, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and Merger*, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *L[illegible]-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 237 (dissenting opinion) (1945).

[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra.*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra.*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purposes of being heard before the entry of the merger and status orders. 353 U. S. 151, 173-175.

[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

Final Judgment

[Same Title]

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325 of Title 28 of the United Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respective parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, Adjudged and Decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

Further Ordered, Adjudged and Decreed that Alleghany Corporation, its transfer agents, officers, directors,

servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon the expiration of the stay provided herein for such further orders and directions as may

be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y.
October 17, 1957.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

APPENDIX B

Sections 5(2), (3), (4), (7), (8), (9), (11) and 20a of the Interstate Commerce Act (49 U. S. C. §§ 5(2), (3), (4), (7), (9), (11) and 20a), as they appear in Title 49 of the United States Code, provide in pertinent part as follows:

§ 5. *Combinations and consolidations of carriers.*— • • •

(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated,

and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable:

Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

(3) *Noncarrier deemed carrier upon acquiring control.*

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304 (a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth,

of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of sections 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(4) *Control effected by other than prescribed methods.*

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subparagraph (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

* * *

(7) *Investigation by Commission of effectuation of control by nonprescribed methods.*

The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is

violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

(8) *Jurisdiction of injunctions, etc., against violations of section or orders.*

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) *Supplemental orders by Commission.*

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

* * * *

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or

at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * *

§ 20a. *Securities of carriers; issuance, etc.*—(1) *Carrier defined.*

As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping-car company which is subject to this chapter.

(2) *Issuance of securities; assumption of obligations; authorization.*

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities")

or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption:

(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) *Scope of Commission's authority.*

The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the paragraph (2) of this section.

(4) *Form and contents of application; oath and signature.*

Every application for authority shall be made in such form and contain such matters as the commission may prescribe. Every such application, as also

every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) *Disposition of securities described in application, etc.*

Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission.

(6) *Notice of application to governors of States; intervention; hearings.*

Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) *Guaranty of securities.*

Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(9) *Issue of short-term notes; certificate of notification; proviso.*

The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: *Provided*, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

(10) *Reports by carriers as to securities or proceeds.*

The commission shall require periodical or special reports from each carrier issuing any securities, including such notes, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any

term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.